FILED
JAN 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 514.

JEWELL FRIZZELL, *Petitioner*,

vs.

WABASH RAILROAD COMPANY, a Corporation, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI.

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OPINION BELOW.

The opinion of the Court of Appeals (Tr. 4-13) is reported at 199 F. 2d 153 (Advance Sheet dated December 1, 1952). The proceedings in the District Court were not officially reported.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of Title 28, U. S. C. A., Sec. 1254 (1). The judgment of the Court of Appeals was entered October 15, 1952 (Tr. 13-14). Petition for rehearing (Tr. 15-26) was denied on November 5, 1952 (Tr. 27).

The jurisdiction of the District Court was founded upon an action arising under the laws of the United States (Title 45, U. S. C. A., Sec. 51 *et seq.*) under Title 28, U. S. C. A., Sec. 1331. The jurisdiction of the Court of Appeals was invoked under Title 28, U. S. C. A., Sec. 1291.

QUESTIONS PRESENTED.

1. Whether all of the facts and circumstances of petitioner's case made a *prima facie* showing of negligence under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51 *et seq.*), requiring submission of the question of respondent's negligence to the jury?

2. Whether the decision of the Court of Appeals erroneously invoked the defenses of contributory negligence and assumption of risk, depriving petitioner of his immunity from said defenses as provided by Sections 3 and 4 of the Federal Employers' Liability Act (45 U. S. C. A., Secs. 53 and 54)?

STATEMENT

Petitioner's Statement of Facts is substantially correct as far as it goes, but it omits material facts and fails to give the complete factual situation which was the basis of the decision of the Court of Appeals.

Respondent submits that the statement of facts at the beginning of the opinion of the Court of Appeals is more nearly fair, complete and unbiased, while at the same time stating the facts in the light most favorable to petitioner. Respondent therefore adopts the statement of facts from the opinion of the Court of Appeals (Tr. 4-7).

ARGUMENT OPPOSING ISSUANCE OF WRIT.

I.

Certiorari Should Be Denied. Petitioner Has Failed to Show That the Questions Presented Are of Special Importance or Involve Public Interest and Has Failed to Show a Conflict with Decisions of This Court.

The issuance of the writ of certiorari by this Court is highly discretionary. This is as it should be, for if Congress had not so provided, the Court would be paralyzed by its submergence in thousands of appeals.

As the Court said in its opinion in *Magnum Import Company* v. *Coty*, 262 U. S. 159, 67 L. Ed. 922, l. c. 924:

> "The question how the court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the circuit courts of appeal was given for two purposes; first to secure uniformity of decision between those courts in the nine circuits; and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing."

Petitioner in his reasons relied on for the issuance of the writ other than the bare fact that the case arises under the Federal Employers' Liability Act, relies entirely

on an alleged conflict of the opinion below with opinions of this Court, opinions of the various courts of appeal, and the provisions of the Federal Employers' Liability Act.

Petitioner alleges that the opinion in the court below conflicts with the opinion of this Court in *Blair* v. *Baltimore & Ohio R. Co.*, 323 U. S. 600, 89 L. Ed. 490. In that case the plaintiff was ordered, over his objections, to use a light truck of insufficient capacity to unload certain heavy steel tubes. He used the light truck and was injured as a result. In the case at bar there was no comparable question, since petitioner was himself free to order the push car's removal at any place he chose. Respondent cannot be convicted of negligence if petitioner, under no compulsion, selected a place where the embankment was steep.

In the other case with which a conflict is alleged, namely, *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 87 L. Ed. 1444, the plaintiff, an inexperienced employee, was ordered to unload a hopper car by standing in an insecure place and using a wrench to turn a shaft which was out of order. Plaintiff was injured when the shaft suddenly turned and he was thrown from his place of work. In the case at bar, the evidence showed there were many suitable places to remove the push car, but petitioner himself selected the particular place where it was done, and no one ordered him to do so. Furthermore, there was no defective or deceptive condition even at that place, as there was in the *Bailey* case. Thus, both of the cases which petitioner relies on are clearly distinguishable from the case at bar, and the opinion of the Court of Appeals does not conflict with either.

Petitioner lists five surrounding facts or circumstances from which he alleges negligence may be inferred, and which he claims were overlooked by the Court of Appeals

in its consideration of the case. All of these were, in fact, considered and dealt with by the Court of Appeals in its well-reasoned opinion (Tr. 4-13).

II.

The Decision Below Is Not in Conflict with Decisions of Other Courts of Appeal Involving the Same Question.

Petitioner alleges that the opinion below conflicts with three opinions of other courts of appeal. In the first of these, *Stewart* v. *Baltimore & Ohio R. Co.*, (2d Cir.) 137 F. 2d 527, the plaintiff suffered a heart attack as a result of attempting to operate a switch which was stiff and worked hard. It was held to be a jury question as to whether the railroad was negligent in furnishing such a switch, which plaintiff was *required* to use. In the case at bar, petitioner was not *required* to remove the push car at any particular point, and it was up to him to determine whether he would help handle the push car or let the members of his section crew do it (R. 42). There had never been more men in his crew than on the day of the accident (Sup. R. 7), and there were places where two men could remove the push car (Sup. R. 5).

In *Robak* v. *Penn. R. Co.*, (2d Cir.) 178 F. 2d 485, the plaintiff, a woman, was employed in the defendant railroad's upholstery shop. Defendant, although it knew she had a weak back, *ordered* her to do heavy work, resulting in her injury. In the case at bar, petitioner was not *ordered* to do anything. He was the foreman and made his own decision.

In *Boston and Maine R. Co.* v. *Kyle*, 156 F. 2d 112, plaintiff was handling a heavy engine part, and in doing so was injured. Plaintiff's foreman had *ordered* him to use

a certain method of work, when there was a safer method sometimes used in the shop. If this method had been used the plaintiff would not have been injured. These facts are in nowise analogous to those here involved.

Respondent submits that the opinion in the court below does not conflict with any of the foregoing cases, and no justification for a writ of certiorari has been shown by petitioner.

III.

The Decision Below Is Not in Conflict with Sections 53 and 54, Title 45, U. S. C. A.

Petitioner, on page 20 of his petition, and under point III, attacks the Court of Appeals' opinion as a recognition of the now-abolished defenses of "contributory negligence" and "assumption of risk." He quotes, *out of context,* a sentence from the Court's opinion (Tr. 9, which is erroneously cited as Tr. 5 by petitioner) in support of his contention. When read *in context,* the quoted sentence has an entirely different meaning than petitioner contends. The opinion cites *Ellis* v. *Union Pacific R. Co.,* 329 U. S. 649, 67 S. Ct. 598, and *Wilkerson* v. *McCarthy,* 336 U. S. 53, 69 S. Ct. 413, as authority for the proposition that respondent would not necessarily be absolved from negligence by reason of the fact that petitioner chose a hazardous place to remove the push car, but would still be negligent if respondent should have anticipated that petitioner might reasonably be expected to choose the hazardous location, because petitioner's contributory negligence is no defense. The Court then went on to point out that since, in this case, unlike the *Ellis* case, the hazard was so obvious as to preclude its being reasonably expected by respondent that petitioner might choose it, there was no basis for a finding of negligence by respondent. It was in this connection that the

court below used the sentence quoted out of context (Tr. 9), and its meaning is not at all subject to the twisted interpretation urged by petitioner. The reference in the quoted language was to the foreseeability by respondent of petitioner's careless act, and not to "contributory" negligence.

The Court of Appeals expressly recognized that neither "contributory negligence" nor "assumption of risk" are bars to recovery under the Act (Tr. 9 and 10), but it also recognized that there could be no submissible case unless there was *some* evidence of negligence by respondent.

Respondent submits that the opinion of the court below is entirely in harmony with the Act, and shows that the court considered every circumstance which might tend in law to place a duty on the respondent. After considering the petitioner's evidence, and all of the permissible inferences which could be drawn therefrom in his favor, the court below arrived at the inescapable decision that fair-minded men could not differ on the issue of what "a reasonable and prudent man would have done under the circumstances of the situation." See *Anderson* v. *Atchison, Topeka & Santa Fe R. Co.*, 333 U. S. 821, 92 L. Ed. 1108. To have concluded otherwise would have been to impose on respondent and all railroads the duty of abolishing embankments along railroad rights of way, and thereby provide continuous level surfaces for the use of section foremen who might not use sound judgment in selecting a place to remove a push car from the track.

CONCLUSION.

Respondent submits that, in keeping with the practice of this Court, this case does not merit a review by certiorari.

The reasons for this practice were indicated by Chief Justice Taft for a unanimous Court in *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, 393, 67 L. Ed. 712, 714.

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

Petitioner has failed to show that the decision in the court below conflicts either with decisions in this Court or in the various courts of appeal.

Respondent respectfully urges, therefore, that the petition for certiorari be denied.

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